

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CUONG HUY DAO,

Plaintiff,

v.

C. VANHORN, et al.,

Defendants.

No. 2:23-cv-00682-TLN-CKD

ORDER

Plaintiff is a state prisoner proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and is proceeding in forma pauperis. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302. Plaintiff's amended complaint is now before the court.

**I. Screening Requirement**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact.

Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th

1 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
 2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
 3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
 4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
 5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon  
 7 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in  
 8 support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467  
 9 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt  
 10 Lake Log Owners Ass’n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under  
 11 this standard, the court must accept as true the allegations of the complaint in question, Hosp.  
 12 Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light  
 13 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor, Jenkins v.  
 14 McKeithen, 395 U.S. 411, 421 (1969).

## 15 II. Allegations in the First Amended Complaint

16 While an inmate at California State Prison-Sacramento (“CSP-Sac”), plaintiff was taken  
 17 to an outside medical appointment on March 9, 2020 with ophthalmologist Dr. Tusluk, who is  
 18 named as the only defendant in this case. Dr. Tusluk contracts with the California Department of  
 19 Corrections and Rehabilitation to provide medical services for prisoners. ECF No. 13 at 3.  
 20 Plaintiff alleges that Dr. Tusluk permanently damaged plaintiff’s vision in his left eye with a laser  
 21 surgery procedure he performed. ECF No. 13 at 4. “For no other reason[] than acts of deliberate  
 22 indifference, tainted with discriminat[ory] actions, ... Dr. Tusluk... used the tools and medicines  
 23 of his trade to harm [plaintiff]....” ECF No. 13 at 8. Plaintiff also alleges that Dr. Tusluk  
 24 “sadistically” checked his eyes, but he does not explain how. Id. After concluding that plaintiff’s  
 25 retinal detachment of his right eye could not be fixed, Dr. Tusluk informed plaintiff that he had a  
 26 small retinal detachment in his left eye that could be fixed with laser surgery. Id. at 8-9. Plaintiff  
 27 was worried about being blinded in both eyes, but he agreed to have Dr. Tusluk perform the laser  
 28 surgery that same day. Id. at 9. Dr. Tusluk then performed the laser eye surgery which caused

1 plaintiff pain. Id. at 10. Plaintiff asserts that Dr. Tusluk did not provide him with darkened eye  
2 shields once he left the office which caused plaintiff further pain. Id. The eye drops that Dr.  
3 Tusluk provided plaintiff after the surgery further damaged his vision in his left eye and left him  
4 nauseated. Id. at 11. Plaintiff alleges that Dr. Tusluk committed malpractice when he performed  
5 the laser eye surgery. Id. at 11. By way of relief, plaintiff seeks compensatory and punitive  
6 damages. ECF No. 13 at 6.

### 7 **III. Legal Standards**

8 Denial or delay of medical care for a prisoner's serious medical needs may constitute a  
9 violation of the prisoner's Eighth and Fourteenth Amendment rights. Estelle v. Gamble, 429 U.S.  
10 97, 104-05 (1976). An individual is liable for such a violation only when the individual is  
11 deliberately indifferent to a prisoner's serious medical needs. Id.; see Jett v. Penner, 439 F.3d  
12 1091, 1096 (9th Cir. 2006); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Lopez v.  
13 Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000).

14 In the Ninth Circuit, the test for deliberate indifference consists of two parts. Jett, 439  
15 F.3d at 1096, citing McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991), overruled on other  
16 grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the  
17 plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's  
18 condition could result in further significant injury or the 'unnecessary and wanton infliction of  
19 pain.'" Id., citing Estelle, 429 U.S. at 104. "Examples of serious medical needs include '[t]he  
20 existence of an injury that a reasonable doctor or patient would find important and worthy of  
21 comment or treatment; the presence of a medical condition that significantly affects an  
22 individual's daily activities; or the existence of chronic and substantial pain.'" Lopez, 203 F. 3d  
23 at 1131-1132, citing McGuckin, 974 F.2d at 1059-60.

24 Second, the plaintiff must show the defendant's response to the need was deliberately  
25 indifferent. Jett, 439 F.3d at 1096. This second prong is satisfied by showing (a) a purposeful act  
26 or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the  
27 indifference. Id. Under this standard, the prison official must not only "be aware of facts from  
28 which the inference could be drawn that a substantial risk of serious harm exists," but that person

1 “must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). This “subjective  
 2 approach” focuses only “on what a defendant’s mental attitude actually was.” Id. at 839. A  
 3 showing of merely negligent medical care is not enough to establish a constitutional violation.  
 4 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998), citing Estelle, 429 U.S. at 105-106. A  
 5 difference of opinion about the proper course of treatment is not deliberate indifference, nor does  
 6 a dispute between a prisoner and prison officials over the necessity for or extent of medical  
 7 treatment amount to a constitutional violation. See, e.g., Toguchi v. Chung, 391 F.3d 1051, 1058  
 8 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Furthermore, mere delay of  
 9 medical treatment, “without more, is insufficient to state a claim of deliberate medical  
 10 indifference.” Shapley v. Nev. Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).  
 11 Where a prisoner alleges that delay of medical treatment evinces deliberate indifference, the  
 12 prisoner must show that the delay caused “significant harm and that Defendants should have  
 13 known this to be the case.” Hallett, 296 F.3d at 745-46; see McGuckin, 974 F.2d at 1060.

#### 14 **IV. Analysis**

15 The court finds the allegations in plaintiff’s amended complaint so vague and conclusory  
 16 that it is unable to determine whether the current action is frivolous or fails to state a claim for  
 17 relief. The court has determined that the amended complaint does not contain a short and plain  
 18 statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible  
 19 pleading policy, a complaint must give fair notice and state the elements of the claim plainly and  
 20 succinctly. Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must  
 21 allege with at least some degree of particularity overt acts which Dr. Tusluk engaged in that  
 22 support plaintiff’s claim. Id. Plaintiff does not provide sufficient facts to demonstrate that Dr.  
 23 Tusluk knew of and disregarded an excessive risk to plaintiff’s vision in his left eye by  
 24 performing the laser eye surgery. See Farmer v. Brennan, 511 U.S. 825, 837 (1994). Moreover,  
 25 alleging medical malpractice is not sufficient to state an Eighth Amendment violation of  
 26 deliberate indifference to plaintiff’s serious medical needs. See Estelle v. Gamble, 429 U.S. 97,  
 27 106 (1976). For all these reasons, the amended complaint must be dismissed. The court will,  
 28 however, grant plaintiff leave to file a second amended complaint.

1 If plaintiff chooses to file a second amended complaint, plaintiff must demonstrate how  
2 the conditions complained of have resulted in a deprivation of plaintiff's federal constitutional or  
3 statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the second amended  
4 complaint must allege in specific terms how each named defendant is involved. There can be no  
5 liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a  
6 defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v.  
7 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.  
8 1978). Furthermore, vague and conclusory allegations of official participation in civil rights  
9 violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

10 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
11 make plaintiff's second amended complaint complete. Local Rule 220 requires that an amended  
12 complaint be complete in itself without reference to any prior pleading. This is because, as a  
13 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
14 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a second amended complaint, the original  
15 pleading no longer serves any function in the case. Therefore, in a second amended complaint, as  
16 in an original complaint, each claim and the involvement of each defendant must be sufficiently  
17 alleged.

#### 18 **V. Plain Language Summary for Pro Se Party**

19 The following information is meant to explain this order in plain English and is not  
20 intended as legal advice.

21 The court has reviewed the allegations in your amended complaint and determined that  
22 they do not state any claim against the defendant. Your amended complaint is being dismissed,  
23 but you are being given the chance to fix the problems identified in this screening order.

24 Although you are not required to do so, you may file a second amended complaint within  
25 30 days from the date of this order. If you choose to file a second amended complaint, pay  
26 particular attention to the legal standards identified in this order which may apply to your claims.

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1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. The Findings and Recommendations issued on September 26, 2023 (ECF No. 10) are  
3 vacated based on plaintiff's filing of the amended complaint.

4 2. Plaintiff's amended complaint is dismissed.

5 3. Plaintiff is granted thirty days from the date of service of this order to file a second  
6 amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules  
7 of Civil Procedure, and the Local Rules of Practice; the second amended complaint must bear the  
8 docket number assigned this case and must be labeled "Second Amended Complaint"; failure to  
9 file a second amended complaint in accordance with this order will result in a recommendation  
10 that this action be dismissed.

11 Dated: April 4, 2024



CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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